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Pluralism, Polarization, and the Common Good: The Possibility of *Modus Vivendi* Legal Ethics

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ABSTRACT. Scholars and critics of the legal profession often call on lawyers to represent clients in the public interest or with due regard for justice. However, in a climate of intense political polarization, rule-of-law values are of paramount significance for legal ethics.

INTRODUCTION

The title of this *Forum* Collection, *Legal Ethics in Today's Political Climate*, immediately suggests the question: as compared with previous eras, what are the features of *today's* political climate that bear on legal ethics? The answer I would give is deep and strident polarization, mistrust of government officials, and a persistent effort to delegitimize sources of factual information and establish a "post-truth" political culture.[1] Yet in spite of these features, the legal profession, including the judiciary, has mostly stayed true to its foundational values: adherence to positive law as enacted and applied by institutions of the legal system and respect for the political-ethical ideal of the rule of law.

1. It would take a footnote as long as this Essay to fully characterize and account for the phenomena of political polarization, mistrust, and the post-truth media environment. In a pair of articles bookending the Trump Administration, I have written about President Trump's assault on the rule of law and defended the regulatory and ethical norms of the legal profession in response. *See* W. Bradley Wendel, *Truthfulness and the Rule of Law*, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y 795 (2021); W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 HASTINGS L.J. 275 (2017) [hereinafter Wendel, *Government Lawyers in the Trump Administration*].

Those foundational values do not include, as is frequently asserted, the public interest, the common good, or justice.[2] I have defended this controversial position for most of my career as a legal ethics scholar,[3] but the events of the last four years provide an occasion for a victory lap of sorts. Four years of a government headed by President Donald Trump put democratic, political, and civil-society institutions under tremendous strain.[4] Many of those institutions could not withstand the pressure. Congress was significantly stymied in its oversight role with respect to the executive branch, largely owing to the Administration's resistance.[5] Intrabranch checks and balances were mostly brushed aside by political appointees, despite having been much touted in recent years by public-law scholars.[6] And informal norms whose efficacy had long been taken for granted, such as the practice by presidential candidates of disclosing their tax returns,[7] were completely ignored.

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2. I refer to that position on foundational values as the "wise-counselor" conception of legal ethics. It is associated with the work of, among others, Deborah Rhode, Anthony Kronman, William Simon, and Thomas Shaffer. *See infra* note 15 and accompanying text.

3. *See, e.g.*, W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010); W. Bradley Wendel, *The Limits of Positivist Legal Ethics: A Brief History, a Critique, and a Return to Foundations*, 30 CAN. J.L. & JURIS. 443 (2017).

4. Not that it was difficult to see these things coming, but I predicted much of the pressure on the rule of law in Wendel, *Government Lawyers in the Trump Administration*, *supra* note 1, at 284-93.

5. *See, e.g.*, Brianne Gorod, *The Need for Congressional Oversight Goes Far Beyond Impeachment*, ATLANTIC (Sept. 30, 2019), https://www.theatlantic.com/ideas/archive/2019/09/future-congressional-oversight-risk/598996 [https://perma.cc/AD8W-4UAX].

6. *See, e.g.*, Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227 (2016); Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032 (2011); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

7. Every major presidential nominee for the last forty years has voluntarily agreed to disclose their tax returns as a way of building trust with the electorate. As a candidate, however, Donald Trump refused to disclose his tax returns. *See* Drew Harwell, *All the Excuses Trump Has Given for Why He Won't Release His Tax Returns*, WASH. POST (Sept. 15, 2016), https://www.washingtonpost.com/news/business/wp/2016/09/15/a-running-tally-of-trumps-many-excuses-for-why-he-wont-release-his-tax-returns [https://perma.cc/FKV5-U4AU]. The *New York Times* obtained several years' worth of President Trump's tax returns from an unknown source, which reveal significant disparities between his public statements about his financial position and what was reported to the Internal Revenue Service. *See* Russ Buettner, Susanne Craknonig & Mike McIntire, *Long-Concealed Records Show Trump's Chronic Losses and Years of Tax Avoidance*, N.Y. TIMES (Sept. 27, 2020), https://www.nytimes.com/interactive/2020/09/27/us/donald-trump-taxes.html [https://perma.cc/T4QM-VJUK]. Unsurprisingly, President Trump referred to this report as "totally fake news," but did not furnish his tax returns in response, nor did he dispute any specific points in the *Times* re-

By contrast, the legal profession and the judiciary remained true to what I have maintained should be the fundamental normative commitments of legal ethics. For example, it was arguably adherence to positive law and respect for the rule of law that led even historically Republican-leaning law firms to decline to support Trump's attack on the validity of the 2020 presidential election. In the end, the few high-profile lawyers who led the charge to invalidate the election results found themselves subject to litigation sanctions and even exposure to liability for defamation.[8] And although some high-level government lawyers were accused of politicizing their roles—most notably Attorney General William Barr and Deputy Attorney General Rod Rosenstein—even Barr refused to follow Trump's instructions to attempt to overturn the election.[9]

Along with the two foundational values that I identified above, there are a cluster of values that have been subject to decades of criticism from the left, including objectivity, neutrality, rationality, and the law-politics distinction.[10] Although I share many first-order political commitments with progressives, I argue that a small-c conservative conception of legal ethics can fortify the legal profession in general and government lawyers in particular against the dangers of authoritarian populism. By "small-c conservative conception," I mean a

porting. *See* Nolan D. McCaskill, *Trump Calls NYT Report on Tax Avoidance 'Totally Fake News,'* POLITICO (Sept. 27, 2020, 6:43 PM EDT), https://www.politico.com/news/2020/09/27/trump-calls-nyt-tax-report-totally-fake-news-422330 [https://perma.cc/GS98-65WY].

8. *See, e.g.*, Jacqueline Thomsen, *'Cannot Be Tolerated': Lawyers Push for Trump and His Allies to Be Sanctioned in Wisconsin Post-Election Suits*, NAT'L L.J. (Apr. 1, 2021, 11:11 AM), https://www.law.com/nationallawjournal/2021/04/01/cannot-be-tolerated-lawyers-push-for-trump-and-his-allies-to-be-sanctioned-in-wisconsin-post-election-suits [https://perma.cc/2F45-GBXM]; Alan Feuer, *Dominion Voting Systems Files Defamation Lawsuit Against Pro-Trump Attorney Sidney Powell*, N.Y. TIMES (Mar. 26, 2021), https://www.nytimes.com/2021/01/08/us/politics/dominion-voting-systems-files-defamation-lawsuit-against-pro-trump-attorney-sidney-powell.html [https://perma.cc/23TF-F4NK]; Jemima McEvoy, *Detroit Files Request to Sanction, Potentially Disbar Sidney Powell and Other 'Kraken' Lawyers*, FORBES (Jan. 6, 2021, 9:12 AM EST), https://www.forbes.com/sites/jemimamcevoy/2021/01/06/detroit-files-request-to-sanction-potentially-disbar-sidney-powell-and-other-kraken-lawyers [https://perma.cc/7MK7-HPY3]; David Yaffe-Bellany, *Trump-Backing Lawyer May Face Discipline in Election Case*, BLOOMBERG (Jan. 4, 2021, 4:33 PM EST), https://www.bloomberg.com/news/articles/2021-01-04/lawyer-alleging-election-fraud-could-face-disciplinary-action [https://perma.cc/5525-JUZ3].

9. Bruce A. Green & Rebecca Roiphe, Commentary, *A January Massacre Averted and the Lawyers Who Helped*, N.Y.L.J. (Jan. 28, 2021, 10:30 AM), https://www.law.com/newyorklawjournal/2021/01/28/a-january-massacre-averted-and-the-lawyers-who-helped [https://perma.cc/J6QU-43XE].

10. For a brief overview of the debate about the value of neutral principles in legal decision-making, see Barry Friedman, *Neutral Principles: A Retrospective*, 50 VAND. L. REV. 503, 507-30 (1997).

commitment to the sorts of values that are often referred to as legality or the rule of law. Rule-of-law values do not pertain to the justice of political arrangements or legal rules, but to the process by which they are enacted and administered. Commitment to the rule of law means defending legal rules, procedures, and institutions against gross manipulation in the service of some political end.[11]

I also contend that competing conceptions of legal ethics, particularly those that direct lawyers to consider the common good or the public interest, would have been powerless to resist the Trumpian assault. As repellent as some, including myself, find the credo of "Make America Great Again," it is at least recognizable as a political position that reasonable people might subscribe to—that is, a plausible conception of the common good or the public interest. Lawyers who believe that their ethical obligation is to promote the public interest would have to contend with the Trump Administration's defense that its actions were justified by the President's vision of the common good. By contrast, lawyers can share an ethical duty to a thinner set of commitments associated with the value of legality—even though they disagree about the substantive content of the common good—and avoid such problematic entanglements.

The debate in legal ethics between those who emphasize fidelity to positive law and scholars who emphasize the common good or the public interest is isomorphic to the long-running opposition in political philosophy between liberalism and alternatives such as communitarianism, republicanism, and deliberative democracy. It is well understood in the political-theory literature, though less so in legal ethics, that pluralism presents just as much of a challenge to liberal conceptions of legitimacy as it does to communitarian or republican accounts.[12] Pluralists observe that human goods are diverse, sometimes conflicting, and cannot be reduced to a common value. Morality does make some universal demands that are binding on all rational agents, but above the threshold of moral acceptability, there is a wide range of wants, desires, and objectives that are compatible with human flourishing.[13] The interesting theoretical question is whether characteristic liberal political commitments, such as equality, freedom of expression, and separation of church and state, are goods about which reasonable people may disagree, or if they are entailed by the re-

11. *See, e.g.*, E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 263 (1975) (defending the ideal of the rule of law even in the context of English laws that redistributed property rights to the detriment of those who had used traditional common-use rights).

12. *See, e.g.*, Gerald F. Gaus, *Public Reason Liberalism*, *in* THE CAMBRIDGE COMPANION TO LIBERALISM 112, 122 (Steven Wall ed., 2015); John Kekes, *The Incompatibility of Pluralism and Liberalism*, 29 AM. PHIL. Q. 141, 141 (1992).

13. Kekes, *supra* note 12, at 141-43.

quirements of universal morality, which are not subject to reasonable disagreement.

Building on the literature on pluralism, disagreement, and public reason in political philosophy, Part I makes two related theoretical points. First, if *liberal* legitimacy via shared public reason is undermined by reasonable pluralism and conflict, then direct appeals to the common good or public interest are doomed to fail. Second, legitimacy can be attained through an agreement on the means of resolving conflicts by using fair procedures that include the promulgation of positive laws. Thus, the normative core of legal ethics is related to the role that lawyers play as intermediaries between state law and citizens.[14] Part II illustrates this thesis with examples that show how competing conceptions of legal ethics would resolve specific cases that have arisen, or might arise, at the intersection of law and politics. It demonstrates that the "right reasons" that support the stability of a political community during highly polarized times are relatively thin procedural considerations, not substantive principles of justice or the public interest.

I. THEORY: WHAT LEGAL ETHICS CAN LEARN FROM THE LIMITATIONS OF PUBLIC-REASON LIBERALISM

A. The Wise-Counselor Conception

In some form or another, the wise-counselor conception has long dominated legal ethics, defended by leading scholars including Deborah L. Rhode, William H. Simon, David Luban, Anthony T. Kronman, Thomas L. Shaffer, Geoffrey C. Hazard, Jr., and Eli Wald and Russell G. Pearce.[15] The wise counselor is both technically proficient at the practice of law and well-versed in their

14. Compare Daniel Markovits's argument that lawyers bring legitimacy down from the wholesale to the retail level. *See* DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE 146-47 (2008).

15. *See* DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE (2000); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE (1998); DAVID LUBAN, LAWYERS AND JUSTICE (1988); ANTHONY T. KRONMAN, THE LOST LAWYER (1993); Thomas L. Shaffer, *The Legal Ethics of Radical Individualism*, 65 TEX. L. REV. 963 (1987); Geoffrey C. Hazard, Jr., *The Lawyer as Wise Counselor*, 49 LOY. L. REV. 215 (2003); Eli Wald & Russell G. Pearce, *Being Good Lawyers: A Relational Approach to Law Practice*, 29 GEO. J. LEGAL ETHICS 601 (2016). Even scholars who defend the so-called standard conception of legal ethics, with its core duty of neutral partisanship, often seek to make room for lawyers to engage in "moral dialogue" with their clients. *See, e.g.*, Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. BAR FOUND. RES. J. 613, 630-32.

client's industry, the surrounding community, and public affairs.[16] A more ambitious version of wise-counselor professionalism presents the lawyer as a bridge between the public and private worlds that harmonizes the self-interest of individual clients with the public interest and contributes to social ordering with a foundation of shared values.[17] Wise-counselor lawyers are prepared to engage with their client's ends, as well as provide the means for their realization.

The wise-counselor tune can be played in the key of virtue ethics, with one scholar describing ideal lawyers as "[s]enior, sober, sensible, sagacious, [and] responsible."[18] The most sophisticated aretaic approach is Anthony T. Kronman's. Against reductionist economic conceptions, he describes a movement known as "new republicanism," which argues that the public interest or the common good cannot be reduced to an aggregation of individual interests.[19] Instead, deliberation itself, within a political community characterized by a spirit of fraternity, constitutes the public good.[20] Lawyers contribute to the realization of the public interest or the common good—which, importantly, may not coincide with their clients' ends—by exercising the paired virtues of sympathy and detachment.[21] As fiduciaries for their clients, lawyers should sympathetically seek to discern and promote their clients' ends, while also taking into account the standpoint of "the good of the community that the laws establish and affirm."[22] In other words, this approach to lawyering is not merely partisan or "zealous" advocacy. Former Watergate Special Prosecutor Archibald Cox, for example, once said that lawyers serving powerful clients sometimes have an ethical obligation to tell their clients, "Yes, the law lets you do that, but don't do it. It is a rotten thing to do."[23]

One notable problem with wise-counselor legal ethics is its reliance on a singular conception of the public interest or the common good and, for that matter, a singular political community whose good is to be promoted by politi-

16. *See, e.g.*, Thomas L. Shaffer, *The Practice of Law as Moral Discourse*, 55 NOTRE DAME L. REV. 231, 232-34, 252-53 (1979).

17. *See, e.g.*, KRONMAN, *supra* note 15, at 66-74.

18. Hazard, *supra* note 15, at 227.

19. KRONMAN, *supra* note 15, at 32-33.

20. *Id.* at 99-100.

21. *Id.* at 66-74.

22. *Id.* at 141.

23. MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 35 (1994) (citing Gary A. Hengstler, *News*, ABA J., Apr. 1989, at 36).

cal officials or lawyers. For example, in the quotation above, Kronman references "*the* good of *the* community." That is not to say that Kronman does not recognize the problem of value pluralism.[24] Indeed, he writes that "the whole range of interests that human beings pursue with such passionate intensity" is diverse and potentially incommensurable, and even acknowledges that there is no single overarching governing ideal capable of bringing them all into ordered harmony.[25] Yet Kronman asserts that this inherent diversity of interests can and should be addressed by the legal profession—that the distinctive contribution of lawyers to the stability and flourishing of a political community is reconciling conflicting ideals from the standpoint of the community as a whole, relying on the virtues of sympathy and detachment.[26] In highly polarized times, however, we may come to doubt whether lawyers can appeal to a spirit of political fraternity when advising clients. Even with the concession that the clients and others may pursue ends that are diverse and conflicting, the ideal of fraternity requires a shared sense of belonging to a shared political community.

State rules of professional conduct permit lawyers to counsel clients based not only on the applicable law, but also on "moral, economic, social and political factors" that the lawyer believes are relevant to the client's situation.[27] Short of the lawyer deceiving or coercing the client in some manner, this approach to counseling alone does not present a substantial difficulty from the point of view of the lawyer-client relationship, with its characteristic agency-law duties

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24. To be a pluralist is not to be a relativist. Pluralists observe the existence of a diversity of genuine human goods and values. To the question of what is a life well lived, a pluralist would answer that there are many different lives that could fit the description of flourishing. *See, e.g.*, Isaiah Berlin, *The Pursuit of the Ideal*, *in* THE CROOKED TIMBER OF HUMANITY (Henry Hardy ed., 1990). However, not everything goes. Berlin, for example, avoids the charge of relativism by invoking the idea of the human horizon:

> I am not blind to what the Greeks valued—their values may not be mine, but I can grasp what it would be like to live by their light, I can admire and respect them, and even imagine myself as pursuing them, although I do not—and do not wish to, and perhaps could not if I wished. Forms of life differ. Ends, moral principles, are many. But not infinitely many: they must be within the human horizon.

Id. at 12; *see also* George Crowder, *Pluralism, Relativism, and Liberalism*, *in* THE CAMBRIDGE COMPANION TO ISAIAH BERLIN 229, 234-45 (Joshua L. Cherniss & Steven B. Smith eds., 2018) (discussing Berlin's concept of value pluralism).

25. KRONMAN, *supra* note 15, at 154-60.

26. *Id.* at 95-101, 160-62.

27. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR ASS'N 2020).

requiring the lawyer to follow the instructions of the client.[28] The client may choose to ignore what they believe to be the lawyer's bloviating about fraternity and the public interest, as long as they trust that the lawyer will competently deliver the requested legal services.

However, proponents of the wise-counselor conception generally have something stronger in mind; in particular, a lawyer intending to practice as a wise counselor may choose to limit the services that they provide to their clients to the extent that they are not consonant with justice or the public interest. William H. Simon, for example, has defended a maxim of legal ethics that requires lawyers to evaluate the impact of their actions on the social value of justice. He writes, "Lawyers should take those actions that, considering the relevant circumstances of the particular case, seem likely to promote justice."[29] Suppose, for example, a client wishes to pursue a course of action that the lawyer believes is permitted by a defensible interpretation of the applicable statutes, regulations, and case law, but is inconsistent with a broader understanding of the law's purposes. In the application of his theory to cases, Simon frequently calls upon lawyers in these situations to refuse to provide the assistance sought by their clients, even where it would be legally permissible and in their clients' interests to do so.

In an extended hypothetical based on a union election at Stanford University, Simon argues that university counsel should not take an aggressive position with respect to a newly reconstituted local bargaining unit, despite having a nonfrivolous legal basis for doing so.[30] In this hypothetical, university employees had been represented by a single-employer local bargaining unit that had merged with another local bargaining unit representing workers at multiple

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28. *See* Deborah A. DeMott, *The Lawyer as Agent*, 67 FORDHAM L. REV. 301, 301-02 (1998) (asserting that the principal's fundamental mechanism of control over the agent is the provision of instructions and focusing on how the agent should interpret those instructions); Deborah A. DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 321, 321 (Andrew S. Gold & Paul B. Miller eds., 2014) (discussing an agent's duty to follow the principal's instructions).

29. SIMON, *supra* note 15, at 138. What "justice" amounts to in Simon's theory is actually a fairly complicated matter to untangle. He explicitly equates justice with legal merits, but then develops something like a Dworkinian antipositivist account of legal merits, in which "substantive criteria of interpretation and application, appeals to broad standards and purposes, and . . . general social background customs and values" all bear on the determination of the legal merits of a particular case. *See* Robert W. Gordon, *The Radical Conservatism of* The Practice of Justice, 51 STAN. L. REV. 919, 920, 923 (1999). I have argued that Simon's idea of legal merits should be understood along the lines of Ronald Dworkin's theory of law, set out in *Law's Empire*. *See* WENDEL, *supra* note 3, at 46-48.

30. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1109-13 (1988).

employers. However, the merger ultimately proved unsuccessful and the university employees then sought to restore their prior single-employer bargaining unit. The multi-employer bargaining unit purported to transfer negotiating authority back to the old single-employer unit.

This is where certain legal and ethical issues emerge. The university could have taken the opportunity to campaign against the newly reconstituted local bargaining unit by asserting that the transfer of representative authority was invalid in the absence of a new certification election conducted by the National Labor Relations Board (NLRB). But from the union's perspective, this maneuver would have had no purpose other than to consume significant union resources.

The notable feature of Simon's ethical analysis in this hypothetical is his reliance on considerations that bear on the justice of the parties' positions, not solely on their legal merit.[31] Although these considerations are mere background to the NLRB election procedures that define the legal issues at stake, they are nevertheless in some sense the "real" issues from Simon's point of view of justice or the public interest. On one side, the university and its lawyers believe the union is more interested in theatrically picking fights than in addressing the concerns of ordinary employees. On the other side, the union contends that the university does not want to give up the discretion that elite professionals have over the manner in which hourly workers perform their job duties; union leaders see the organization's militancy as justified in the face of the university's aggressive antiunion activities. After considering the purposes of the federal labor-relations statute governing the election—as well as the comparative institutional competence of the NLRB, the union, and the university—Simon concludes that university counsel should not seek a new certification election.[32]

Simon's union-busting university case illustrates the question of political legitimacy, which is often underappreciated in legal ethics. In an influential early paper, philosopher Richard Wasserstrom recognized this problem: "If lawyers were to substitute *their own private views* of what ought to be legally permissible and impermissible for those of the legislature, this would constitute a surreptitious and undesirable shift from a democracy to an oligarchy of lawyers."[33] The italicized language both identifies the issue of legitimacy and sug-

31. *See id.* at 1111.

32. *Id.* at 1112.

33. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 10-11 (1975) (emphasis added).

gests Simon's response to it. If it is *merely* the private view of university counsel that a certification election would not be in the interests of justice for both parties, then the university's legal right to seek a certification election would be limited by the private position of its lawyer, one not established through the democratic process. One can imagine the university's president confronting the general counsel: "I don't care what *you* think about the justice of requiring an election. What does *the law* permit?" Recognizing this objection, Simon struggles mightily to assimilate the considerations that seem to bear on the justice of the university's position to those that are relevant to interpreting the applicable law. By considering the purposes of the statute and the comparative institutional competence of the actors, his strategy is to show that factors that seem to relate only to whether the legal position asserted by a client is consistent with justice or the public interest are, in fact, relevant to whether the client actually has a legal entitlement to what it is seeking.[34] Simon thereby attempts to transform an ethical question into one of jurisprudence and legal interpretation.

Consider this same hypothetical from the point of view of the university's president (or possibly the university board of trustees) and note the contrast between (1) the university's lawyer's private views about what should be legally permissible; (2) what the law, interpreted by an impartial legal observer, would permit; and (3) what a lawyer for a party could contend for, in good faith, without being subject to sanctions under Rule 11 of the Federal Rules of Civil Procedure or a similar provision.[35] It should be apparent that (1) stands in a different relationship to the client's interests than (2) or (3). Individuals and organizations like the university are limited in their freedom of action by the law. To be limited by another person's private views, however, can be an instance of domination. Domination is the arbitrary interference with the interests of another, without allowing the other to accept or reject the reasons underlying the action.[36] In a liberal democracy, we at least theoretically have a say in the scope of the law's interference with our liberty through means of self-government such as elections, campaign contributions, political organizing, lobbying, and public criticism of the law. But domination can arise when a limitation on the liberty of an individual or entity is imposed on a client through a

34. Simon, *supra* note 30, at 1112-13.

35. As a matter of federal civil procedure, Rule 11 prohibits presenting any pleading, motion, or other paper to the court for any improper purpose or without adequate evidentiary support for the factual contentions and legal support from either existing law or a good-faith argument for the extension, modification, or reversal of existing law. *See* FED. R. CIV. P. 11(b). Lawyers may also be subject to disciplinary liability for bringing frivolous claims under MODEL RULES OF PRO. CONDUCT r. 3.1 (AM. BAR. ASS'N 2020).

36. *See* PHILIP PETTIT, REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 55 (1997).

lawyer's morally grounded refusal to provide assistance to the client, essentially creating Wasserstrom's "oligarchy of lawyers."[37]

One of the most basic legal duties prescribed for lawyers is to "proceed in a manner reasonably calculated to advance a client's lawful objectives, as defined by the client after consultation."[38] Varying Simon's hypothetical, suppose the university president decides to contest the transfer of authority to the reconstituted local bargaining unit and demands a new certification election. Assume further that the president has the power to make this determination under the law of nonprofit organizations, which governs decision-making authority within the university. In a liberal democracy, the university is presumed to have liberty to take actions that are not prohibited by law.[39] Now enter the university's lawyer, who believes it is unjust to force the union to incur the delay and expense of a certification election. The lawyer is free to give this advice to the president, and the president is free to ignore it. As its name suggests, the wise-counselor conception of legal ethics permits *counseling*. Problems of legitimacy

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37. *See supra* note 33 and accompanying text.

38. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16(1) (AM. L. INST. 2000).

39. If the idea of an organization having liberty sounds a bit jarring, the liberty interests involved in this hypothetical can be restated as the interests of individuals acting together, through the means of a nonprofit organization. The Supreme Court in *Citizens United v. Federal Election Commission* held that the federal McCain-Feingold campaign-finance-reform legislation could not restrict expenditures by corporations to any greater extent than it could restrict campaign contributions by individuals because corporations are, for the purposes of constitutionally protected liberty interests, nothing more than associations of citizens. 558 U.S. 310, 349-51 (2010). The corporate form is therefore a kind of pass-through for the interests and objectives of individuals, who just happen to have chosen the corporate form of association. *Citizens United* has been vigorously criticized by corporate-law scholars for treating corporations like partnerships. *See, e.g.*, Jonathan Macey & Leo E. Strine, Jr., Citizens United *as Bad Corporate Law*, 2019 WIS. L. REV. 451, 454-55. However, in *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court reaffirmed the position that, for constitutional purposes, a corporation can be treated as an association of individuals:

> A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.

573 U.S. 682, 706-07 (2014). Thus, the liberty interests in Simon's union-busting university example can be understood as those of the individuals who associate and act together using the form of a nonprofit corporation, and who resolve whatever differences they may have about how to proceed by using governance structures established by the law of nonprofit organizations and the university's constitutional documents.

and dominance do not arise unless and until the lawyer either openly refuses to proceed in a manner reasonably calculated to advance the university's objectives, as defined by the president, or, worse, engages in some kind of subterfuge, such as telling the president that the law, appropriately interpreted, does not permit contesting the bargaining authority of the local. Simon does not come out and say so explicitly, but it is clear from the tenor of his discussion of this hypothetical that he believes an ethical lawyer should refuse to take the action sought by the client.[40] On his version of the wise-counselor conception, a lawyer should take only those actions that are consistent with justice, and justice in this case means not contesting the local bargaining unit's authority.

B. Legitimacy and Public Reason in Legal Ethics

Simon's hypothetical highlights something important about legal ethics that often goes unrecognized: the lawyer-client relationship is a means of governance. The content of legal rights and duties is established through legislation, administrative rulemaking, and common-law adjudication. However, legal rights and duties must further be applied and operationalized in the context

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40. For example, he writes that "[t]he delay and expense of NLRB proceedings arise from a procedural breakdown"—that is, the failure of the merger with the multi-employer local and the attempt to transfer bargaining authority back to the single-employer local—that "triggers some responsibility on the part of university counsel to assess the substantive merits of the university's arguments." Simon, *supra* note 30, at 1110. Notably, Simon's call for an assessment of the substantive merits goes beyond ensuring that the university's arguments do not violate Rule 11 of the Federal Rules of Civil Procedure. *See supra* text accompanying note 35. Simon instead believes that counsel should consider whether the university's argument is "supported only by formal considerations that undercut the relevant statutory purposes." Simon, *supra* note 30, at 1110. But he goes even further than pressing on the form-versus-substance distinction to argue, in effect, that the transfer of bargaining authority to the multi-employer local and the subsequent merger is an instance of "no harm, no foul." He writes that the university was not really harmed by the passing back and forth of bargaining authority, so it should not object to the certification of the reconstituted single-employer local:

> The clear reason for delay is carelessness on the part of the local, but this carelessness does not seem to have prejudiced anyone. The internal changes accompanying disaffiliation are substantial, but they involve a return to the old pre-affiliation structure with which most workers were familiar, and there is no indication of worker dissatisfaction with it.

Id. The payoff for engaging with this hypothetical—and Simon's lengthy discussion of it—is to perceive very clearly the difference between, on one hand, the advice given by a wise counselor and a lawyer focused more on the agency structure of the lawyer-client relationship (with its duty to follow client instructions) and the obligation of fidelity to positive law, and, on the other, considerations that bear on the justice or public interest of the parties' positions.

of the activities of individuals and entities. As Jeremy Waldron has argued, this is not merely an incidental aspect of governance by law, but one of its central features.[41] Law presents itself to its subjects not in the form of top-down, command-and-control direction, but instead as something to be taken up, understood, and complied with by self-governing agents. Waldron observes that legal systems

> operate by using, rather than suppressing and short-circuiting, the responsible agency of ordinary human individuals. Ruling by law is quite different from herding cows with a cattle prod or directing a flock of sheep with a dog. . . . The publicity and generality of law look to what Henry Hart and Albert Sacks called "self application," that is, to people's capacities for practical understanding, for self-control, and for the self-monitoring and modulation of their own behavior, in relation to norms that they can grasp and understand.[42]

Waldron notes in passing the existence of "those who make a profession of being public norm-detectors (lawyers, as we call them),"[43] but has little more to say about the role of lawyers as public-norm detectors and appliers to clients. I believe, however, that Waldron's insight regarding the importance of the self-applying quality of law through the medium of lawyers is absolutely fundamental to legal ethics.[44]

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41. Jeremy Waldron, *The Concept and the Rule of Law*, 43 GA. L. REV. 1 (2008).

42. *Id.* at 26-27 (citing HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 120-21 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

43. *Id.* at 26.

44. More than any other legal-ethics scholar, Daniel Markovits emphasizes the political value of legitimacy. In his view, however, the legitimacy of law at the "retail" level—that is, in its application to the circumstances of individual citizens—requires a comprehensive, affective transformation of the practical identity of members of a political community from individuals who hold positions regarding a dispute to cosovereigns, in the sense that the parties to a dispute jointly author the resolution of the issue of the law's application to the particular situation. *See* MARKOVITS, *supra* note 14, at 180. He contends that this transformation can be affected through (or at least is greatly facilitated by) the assistance of lawyers functioning in an advocacy capacity to give voice to their clients' interests without judging or interfering with them. *Id.* at 83-84. This position resonates with Wasserstrom's concern about an oligarchy of lawyers. However, as the discussion of legitimacy in the text should make clear, I believe it is much too strong a criterion for legitimacy that the attitudes of clients be transformed into that of coauthors of political outcomes. A great deal of grudging acquiescence in outcomes is compatible with law that is *in fact* legitimate, even if regarded with annoyance or resentment by its subjects. Indeed, given the depth and intensity of the polarization that

To see why, continue with Simon's hypothetical. The dispute between the union and the university touches on numerous contestable normative issues in labor relations, such as whether the conduct of management has been oppressively paternalistic and reflective of a preference by elite professionals for unconstrained discretion in setting working conditions; whether union militancy is justified or whether the union should be limited to addressing narrow economic and disciplinary issues; how much accountability by union leadership to rank-and-file members is required and how it should be enforced; and what grievances are worth pursuing and by what means.[45] Informed managers, union leaders, scholars of the workplace, and labor lawyers can reasonably disagree over the resolution of these issues. Telling lawyers that their ethical obligation is to take the actions that seem most likely to promote justice merely forces lawyers to take sides on these contested questions. For a lawyer's view about what justice requires in this situation to be legitimate, it must be one that all affected parties—the university as well as the union—can be expected to endorse in light of principles that appear reasonable to them.[46]

This conception of legitimacy is familiar to readers of the later work of John Rawls, who somewhat tentatively offers it not only as a value associated with the basic structure of the political institutions of a society, but also as a principle of public ethics—the duty of civility. Rawls argues that legitimacy requires that the constitutional essentials of a society be justified in terms that all affected citizens can endorse.[47] He maintains that his conception of legitimacy is not a mere *modus vivendi*[48]—nothing more than a provisional compromise among interests in lieu of deeper agreement—but must be justifiable to all based on reasons they can accept from within their own comprehensive doctrines.[49] However, Rawls later came to appreciate the depth and intractability of the conflict over issues such as abortion and school prayer, and acknowledged that the best a liberal society may be able to do is to seek an outcome that is "for the moment reasonable."[50]

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is the subject of this *Forum* Collection, Markovitsian legitimacy would be denied to a wide swath of law in today's society. *See also* W. Bradley Wendel, *Should Lawyers Be Loyal To Clients, the Law, or Both?*, 65 AM. J. JURIS. 19, 19 (2020) (contrasting fiduciary loyalty with Markovits's stronger conception of negatively capable lawyers).

45. *See* Simon, *supra* note 30, at 1111.

46. JOHN RAWLS, POLITICAL LIBERALISM 217 (2d prtg.1996).

47. *Id.* at 226-27.

48. *Id.* at xxxix, 145-48.

49. *Id.* at 368.

50. *Id.* at lvi.

The core application of the ideal of public reason as necessary for legitimacy is that discussions of political fundamentals, including constitutional essentials, should be conducted based on values that others can endorse from their own standpoint as free and equal.[51] Without necessarily purporting to offer an interpretation of Rawls (although I think it is defensible as such), I seek to extend the application of the ideal of public reason to lower-level, more particular political questions.[52] As applied to Simon's example, the position of a political community with respect to labor-management disputes must be justified to affected citizens—including the university and the union—in terms both could be expected to endorse. But what justification could one party give that the other could endorse, given the sharp disagreement between the two? As Simon himself concedes, the parties "understand the ethical issues in terms of broader perspectives on a complex and longstanding relationship that has become increasingly acrimonious and mistrustful."[53] Moreover, and to Simon's credit for developing an excellent hypothetical, neither party's perspective is *unreasonable*. The difference between their positions is a function of divergent approaches to contestable normative issues, not inability or unwillingness to reason individually and with others in good faith.

Rawls concedes, as I think he must, that "[r]easonable political conceptions of justice do not always lead to the same conclusion, nor do citizens holding the same conception always agree on particular issues."[54] Conflicts are always possible owing to what Rawls refers to as the "burdens of judgment"—complex and conflicting empirical evidence, disagreement about the weight of competing considerations, the vagueness and indeterminacy inherent in all normative concepts, the influence of our subjective experiences and life histories, and value pluralism, as noted above.[55] Yet members of a political community presumably still share an interest in having political relations that are not governed

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51. *Id.* at 226.

52. In so doing, I follow some commentators on Rawls. *See, e.g.*, Charles Larmore, *Public Reason*, *in* THE CAMBRIDGE COMPANION TO RAWLS 368, 381 (Samuel Freeman ed., 2003) ("Why, one might ask, should the domain of public reason be limited to these fundamentals instead of extending to all the political decisions which a community must make? Rawls does not give a clearcut answer to this question."). In the introduction to the paperback edition of *Political Liberalism*, however, Rawls reaffirms the limitation of the ideal of public reason to debates over constitutional essentials and matters of basic justice. *See* RAWLS, *supra* note 46, at liii-lv.

53. Simon, *supra* note 30, at 1111.

54. RAWLS, *supra* note 46, at lvi (internal citations omitted).

55. *Id.* at lx, 55-58.

purely by power and coercion.[56] If agreement on matters of substantive justice is elusive, it may nevertheless be possible to agree that it would be reasonable for members of the community to endorse a means of resolving conflict by using fair procedures. This is not limited to litigation. It can also include agreeing to accept the substantive norms promulgated by democratically accountable institutions such as legislatures and administrative agencies as a basis for working together. Borrowing from legal philosophers Joseph Raz and Scott J. Shapiro, we can understand the parties as being in a predicament calling for resolution by reference to an authoritative settlement of the disagreement (Raz) or adoption by the parties of a mutually agreed-upon plan (Shapiro).[57]

The union and the university are fated to be locked in intractable disagreement over the substantive justice of the parties' competing positions. Exiting the relationship is not a possibility,[58] so the parties need some way to establish a basis for an ongoing course of dealing that is at least moderately stable, if not completely harmonious. The social value of the law is connected to the ability of legal procedures, including lawmaking and law application, to provide a means of resolving disagreement, at least provisionally. To quote Rawls again, the law can establish an outcome that the parties acknowledge as "for the moment reasonable."[59] The law therefore establishes a *modus vivendi*—a way of living and working together that is stable enough to suffice, and better than the alternative of going round and round with intractable deliberation.

Rawls dislikes the idea of a *modus vivendi* as the foundation for the constitution of a political community.[60] In his view, something more than a temporary truce in hostilities is needed to establish stability "for the right reasons."[61] A *modus vivendi* appears to be merely a second-best outcome relative to an ideal in which all affected citizens affirm the "constitutional essentials" of a political community for reasons they can endorse.[62] There is, however, conceptual space

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56. *Id.* at lxii.

57. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM 41-43 (1986) (illustrating the concept of practical authority using the example of parties submitting a dispute to an arbitrator); SCOTT J. SHAPIRO, LEGALITY 170-73 (2011) (referring to the "circumstances of legality" as those conditions under which social planning is desirable but made difficult due to the complexity and contentiousness of the situation).

58. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 15-20 (1970) (arguing that political constituents, unlike customers or employees, may not customarily "exit" political arrangements they disfavor).

59. RAWLS, *supra* note 46, at lvi.

60. *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 781 (1997).

61. *Id.*

62. *See* JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 49 (Erin Kelly ed., 2001).

between an ideal and an unacceptable political arrangement,[63] and if Rawls's own worries about the burdens of judgment apply to all decisions that must be made regarding the rights and duties belonging to members of the political community, a *modus vivendi* might be the best we can do.

In my view, and contrary to the wise-counselor conception, legal ethics exists in the conceptual space between the ideal and the unacceptable. Whereas Thomas Shaffer contends that an ethical lawyer must attend to the good of individuals and communities,[64] a *modus vivendi* legal ethics would insist on bracketing issues related to the good of individuals and communities. Instead, the ethical values relevant to lawyers acting in a professional capacity are those of the community's positive law, established in the name of the community as a whole, precisely for the purpose of avoiding falling back into disagreement over what is good for individuals or the community.[65] This position is sometimes caricatured as amoralism, perhaps reflecting a common misconception about legal positivism.[66] As Shapiro emphasizes, however, a community has a moral aim when it enacts laws that can be identified by their social sources; it is a moral problem, from the point of view of the community, when its members are unable to engage in beneficial cooperation because of the burdens of judgment.[67] It is therefore a good thing, from the moral point of view, when there is some technology that can be used to facilitate peaceful coexistence, coordination, and at least a modest degree of social solidarity despite persistent, and even acrimonious, disagreement. Lawyers contribute to this social good by making the terms of this institutional settlement available to members of the community and enabling its use as a means of planning and cooperation.[68]

This conception of legal ethics may fall short of the ideal because a lawyer may believe, with justification, that a law permits actions that are immoral. But

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63. *See* DAVID MCCABE, MODUS VIVENDI LIBERALISM 162 (2010) ("[I]t seems reasonable to preserve conceptual space for principles falling between those we see as ideal and those we find unacceptable . . . .").

64. *See* THOMAS L. SHAFFER, AMERICAN LAWYERS AND THEIR COMMUNITIES 40, 85 (1991).

65. *See* W. Bradley Wendel, *The Rule of Law and Legal-Process Reasons in Attorney Advising*, 99 B.U. L. REV. 107, 146-47 (2019).

66. *See, e.g.*, John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199, 209-10 (2001) (pointing out that the fact that a norm is an instance of valid law is compatible with its being worthless as a moral matter, and that substantive moral debates about the merit of law are separate from the normatively inert inquiry into whether a norm is legally valid).

67. SHAPIRO, *supra* note 57, at 213-17.

68. *See* TIM DARE, THE COUNSEL OF ROGUES? A DEFENSE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE 57-63 (2009) (making this functionalist account of the ethics of the lawyer's role explicit).

there may be good reasons for this. For example, the First Amendment's protection of expressive and associational liberties may weigh against enforcement of prohibitions on discriminatory speech or the recoverability of damages for emotional distress experienced in response to hateful expression.[69] Furthermore, some degree of unfairness in legislative and administrative rulemaking processes is compatible with the moral aim of law. There is no way to design procedures for making and interpreting law in a large, contentious society that are not subject to some degree of political shenanigans. And in their personal capacities, lawyers are as free as any other member of the political community to criticize and campaign against the community's unjust laws. Acting in a professional role, however, the lawyer's ethical obligations are geared toward sustaining the effective functioning of a system of laws that provides a way for members of the political community to live and work alongside those with whom they disagree about matters of morality.

II. PRACTICE: WHAT DIFFERENCE DOES THE MODEL MAKE?

Consider two examples that illustrate the distinction between the wise-counselor conception of legal ethics and the *modus videndi* model I have been defending for many years. One example arises out of the Trump Administration's efforts to deter asylum seekers from entering the United States, as described in a report by the Department of Justice's (DOJ) Office of the Inspector General and related media coverage.[70] The second example involves Trump's baseless assertions regarding the results of the 2020 presidential election and

69. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 458-60 (2011) (disallowing recovery of damages for intentional infliction of emotional distress against homophobic protests at a funeral).

70. OFF. OF THE INSPECTOR GEN., DEP'T OF JUST., REP. NO. 21-028, REVIEW OF THE DEPARTMENT OF JUSTICE'S PLANNING AND IMPLEMENTATION OF ITS ZERO TOLERANCE POLICY AND ITS COORDINATION WITH THE DEPARTMENTS OF HOMELAND SECURITY AND HEALTH AND HUMAN SERVICES (Jan. 2021); *see also* Michael D. Shear, Katie Benner & Michael S. Schmidt, *'We Need to Take Away Children,' No Matter How Young, Justice Dept. Officials Said*, N.Y. TIMES (Oct. 6, 2020), https://www.nytimes.com/2020/10/06/us/politics/family-separation-border-immigration-jeff-sessions-rod-rosenstein.html [https://perma.cc/U6K6-3MHX] (describing family-separation policies implemented at the United States border); Stephanie Kirchgaessner, *Revealed: Rod Rosenstein Advised There Was No Age Limit on Child Separations*, GUARDIAN (July 23, 2020, 6:00 PM), https://www.theguardian.com/us-news/2020/jul/23/child-separation-migrants-prosecutors-rod-rosenstein [https://perma.cc/XED7-C26G] (reporting that there was no minimum age threshold for family separations).

what Attorney General Barr did—and more importantly, did not do—to support these challenges.[71]

During his time as a presidential candidate, Trump made numerous disparaging comments about immigrants and was widely perceived as dog whistling to nativist anxieties about immigration.[72] Upon his election, President Trump selected as Attorney General a well-known immigration hardliner, Jeff Sessions, who soon thereafter announced a "zero tolerance" policy for migrants crossing the southern border of the United States.[73] Under that policy, the DOJ would prosecute anyone who crossed the border without authorization, and if a child was accompanying adults who were prosecuted, then the child would be separated from the adults.[74] This was a reversal of longstanding policies under which family units would be referred for administrative deportation proceedings, not criminal prosecution, with no effort to separate family members.[75] The Attorney General's intention was that the zero-tolerance and family-separation policies would deter unlawful border crossings.[76]

Outrage over this practice centered on the conduct of Deputy Attorney General Rod Rosenstein.[77] Given his high-ranking role combining that of a lawyer and a policymaker, it would arguably have been appropriate to insist that Rosenstein act as a wise counselor, considering the impact of the DOJ policy on the public interest. He was in a position to forcefully raise an objection with the Attorney General or to act to mitigate the harshness of the family-

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71. *See* Jonathan D. Karl, *Inside William Barr's Breakup with Trump*, ATLANTIC (June 21, 2021), https://www.theatlantic.com/politics/archive/2021/06/william-barrs-trump-administration-attorney-general/619298 [https://perma.cc/V28K-JUG4] (describing a meeting at which Attorney General Barr told reporters that "[t]o date, we have not seen fraud on a scale that could have effected a different outcome in the election").

72. *See* Nicole Narea, *Immigration Is No Longer a Winning Issue for Trump*, VOX (Nov. 2, 2020, 3:00 PM), https://www.vox.com/policy-and-politics/21540020/trump-immigration-2020-election [https://perma.cc/6W7K-AXNM].

73. *See* DEP'T OF JUST., *supra* note 70, at i, 74 (reproducing a memorandum from Attorney General Sessions implementing a "zero-tolerance" policy for certain immigration-related offenses).

74. *See* MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., REP. ON THE TRUMP ADMINISTRATION'S FAMILY SEPARATION POLICY: TRAUMA, DESTRUCTION, AND CHAOS 6-7, 11-12 (2020).

75. *See* DEP'T OF JUST., *supra* note 70, at i.

76. *Id.* at 23.

77. *See* Shear, Benner & Schmidt, *supra* note 70; Ankush Khardori, *Rod Rosenstein Is the Best Emblem of Trump Administration Culpability*, SLATE (Oct. 8, 2020), https://slate.com/news-and-politics/2020/10/rod-rosenstein-ordered-family-separation-new-york-times.html [https://perma.cc/BN84-DGUL].

separation policy. For our purposes, however, consider a lower-level lawyer within the DOJ, the Border Patrol, the Department of Health and Human Services (which had the responsibility to care for the separated children), or one of the United States Attorneys' Offices (USAOs) in a border region. What was she ethically permitted or required to do under those circumstances?

A lawyer who believes her ethical role includes taking account of the good of the community might consider (1) *her own* view of what is in the public interest; (2) what is *in fact* in the public interest; (3) the view of the President and senior policymaking officials regarding the public interest; or (4) the results of elections conducted to determine what a majority of voters believe is in the public interest, which should roughly align with (3) if the Administration is responsive to public opinion.

Proponents of the wise-counselor model are not always clear on which of these alternatives should serve as the yardstick for the public interest in the lawyer's ethical deliberations. Alternative (1) gives too much power to individual lawyers to make what are, in effect, political decisions. Alternative (2) tacitly contradicts the assumption of pluralism that is at the foundation of liberal democratic politics by putting the lawyer in a kind of Platonic guardian role without any assurances that the lawyer, like Plato's supremely wise counselors, has the virtue necessary to determine what is truly in the public interest. Alternatives (3) and (4), meanwhile, may appropriately characterize the duties and obligations of senior government lawyers in a policymaking role (like Rosenstein), who owe considerable deference to the President's own resolution of contested questions of what is in the public interest.

As Geoffrey P. Miller observed in an important article about the ethical responsibilities of government lawyers, the Constitution establishes a process for ascertaining the public interest, and it consists of elections, appointment by the President of agency heads, and legislation. These processes in turn determine the policymaking directives of the executive branch.[78] Given that then-candidate Trump ran on a platform that quite explicitly featured promises to restrict both legal and illegal immigration,[79] from the point of view of a senior government lawyer, President Trump's position should be conclusive of the content of the public interest.

This observation highlights an often-unappreciated irony in the contrast between the wise-counselor conception and its rivals. Because of the contesta-

78. Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1295 (1987).

79. For example, candidate Trump notoriously promised to build a "great, great wall" along the U.S.-Mexico border and to force Mexico to pay for it. *See* Narea, *supra* note 72.

bility of the concept of the public interest and the centrality of democratic procedures for settling these questions, a lawyer relying on the public interest may actually have less leverage to resist unethical outcomes than a lawyer who sees her most important duty as interpreting and applying positive law in good faith. For example, a midlevel lawyer in the Department of Homeland Security or in a border USAO could and should have considered the relevance of all applicable legal norms that pertain to the treatment of migrants apprehended at the border, including the so-called *Flores* settlement, later codified in part.[80] An argument could have been made, for example, that the *Flores* settlement already resolved the legal question of whether it was permissible to separate minor children from their accompanying parents. Such an approach might have enabled an effective response within the agency to the Attorney General's policy directives. By contrast, a mere appeal to the public interest could and likely would have been met with the response given by Miller—that is, that the President and the Attorney General have the prerogative of determining what is in the public interest. Note that there is no similar interpretive latitude with respect to legislation and consent decrees issued by courts. Note too that this example highlights yet another possibility and potential pitfall of the directive to consider the public interest: that a lawyer will choose to prioritize the public interest as it is defined by the President and senior executive-branch officials, rather than as it might be outlined or implied in positive laws.

Of course, if the law is sufficiently unjust, a lawyer may consider strategies such as conscientious objection or resignation.[81] For the most part, however, a lawyer's ethical obligation is to advise clients to comply with the applicable law, not to act in the public interest. Pluralism, disagreement, and the contestability of the public interest is the raison d'être of the law and, as such, requires the lawyer to act with fidelity to law.

The second example, involving challenges to the 2020 presidential-election results, suggests that this conception of legal ethics is not purely an academic exercise, but actually played a role in restraining some of the worst of President Trump's tendencies. Attorney General Barr had been criticized on numerous occasions for appearing to acquiesce to pressure from President Trump to act in

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80. *See* DEP'T OF JUST., *supra* note 70, at 77-78 (discussing the Stipulated Settlement Agreement in *Flores v. Reno*, No. CV-85-4544 (C.D. Cal. Jan. 17, 1997), and 8 U.S.C. § 1232(b)(3) (2018) on the treatment of children in the custody of the federal government).

81. *See* Alexandra D. Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Proceedings*, 57 UCLA L. REV. 725, 755-59 (2010) (considering strategies of resistance employed by lawyers in unjust regimes such as South Africa under Apartheid, and to unjust proceedings such as the military tribunals at Guantánamo Bay).

ways that favored the President's fortunes or benefitted his allies. For instance, political appointees in the Justice Department overrode the recommendation of career prosecutors to seek a seven- to nine-year sentence for Roger Stone, leading four prosecutors to withdraw from the case.[82] Stone, a long-time friend of President Trump, had been convicted of witness tampering and obstruction of justice in the course of the investigation by Special Counsel Robert Mueller into Russian involvement in the 2016 presidential election. His sentence was eventually commuted by the President, reportedly over the objection of Attorney General Barr.[83] Previously, Attorney General Barr had appeared to favor President Trump's political position by releasing a letter commenting on the Special Counsel's report on the investigation into Russian interference.[84] The letter mischaracterized the report, making it appear that the Special Counsel had concluded that there had been no links between Trump campaign officials and actors with ties to the Russian government. Ruling on an action filed under the Freedom of Information Act for the complete Mueller report, a federal judge referred to Attorney General Barr's actions as a "calculated attempt" to help President Trump.[85]

Nevertheless, Attorney General Barr did eventually stand up to President Trump after concluding that all of the President's theories of massive election fraud were, to quote the Attorney General himself, "bullshit."[86] It is an indication of the severity of the threat to our democratic institutions that this incident was reported as a "man bites dog" story, not passed over in silence as another unremarkable example of a lawyer telling a client that the law does not permit them to do what they want to do. It is also possible that Attorney General Barr was merely acting as a politician here, too—responding to Senate Majority Leader Mitch McConnell's urging to tamp down President Trump's attacks on

82. *See* Matt Zapotosky, Devlin Barrett, Ann E. Marimow & Spencer S. Hsu, *Prosecutors Quit Amid Escalating Justice Dept. Fight over Roger Stone's Prison Term*, WASH. POST (Feb. 11, 2020), https://www.washingtonpost.com/national-security/justice-dept-to-reduce-sentencing-recommendation-for-trump-associate-roger-stone-official-says-after-president-calls-it-unfair/2020/02/11/ad81fd36-4cf0-11ea-bf44-f5043eb3918a_story.html [https://perma.cc/AGH8-RRL4].

83. *See* Aaron Blake, *Analysis: How Problematic Is Trump's Roger Stone Commutation? Just Ask Barr*, WASH. POST (July 14, 2020), https://www.washingtonpost.com/politics/2020/07/13/how-problematic-is-trumps-roger-stone-commutation-just-ask-william-barr [https://perma.cc/XBK2-LDGW].

84. *See* Katelyn Polantz, *Federal Judge Blasts William Barr for Mueller Report Rollout, Asks if It Was Meant to Help Trump*, CNN (Mar. 6, 2020, 7:34 PM), https://www.cnn.com/2020/03/05/politics/judge-mueller-report-barr/index.html [https://perma.cc/7WPG-V3CH].

85. *Id.*

86. *See* Karl, *supra* note 71.

the reliability of election results in order to avoid suppressing turnout in two runoff elections pending in Georgia that would determine control of the Senate.[87] I believe, however, that the prominent conservative lawyer and Trump-critic George T. Conway III is correct to remind the public that the legal profession has a deeply ingrained culture of respect for law and facts (notice I did not say justice or the public interest). In an op-ed commenting on the reporting on Attorney General Barr's last stand, Conway writes:

> As Barr put it at the White House with Trump on Dec. 1, . . . "[n]o self-respecting lawyer" would go "anywhere near" the president's meritless claims. He was right: A number of lawyers quit their representation of Trump's campaign as the absurdity of his claims became clear. . . . Precisely because good lawyers couldn't fathom Trump's false claims of fraud, Trump was left with what Barr aptly called a "clown show" of a legal effort—the clown show led by Rudy Giuliani. Giuliani got his well-earned due last week. His ceaseless public lying in support of Trump led a New York court to suspend his license to practice law because his conduct had undermined "the profession's role as a crucial source of reliable information." . . . And for that, in the end, we owe the essential culture of America's legal profession. As exemplified by the decision suspending Giuliani, that culture, at its best, seeks to vindicate factual truth and the rule of law—values entirely anathematic to Trump. Which is why the lawyers could never really be on his side.[88]

I believe that the position I have defended for many years—that the most important values in legal ethics are those related to the rule of law, not to justice or the public interest[89]—is correct as a normative matter. I recognize that one may only speculate about the impact an academic theory of ethics might have on the behavior of lawyers in the real world.[90] But Conway's cultural ex-

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87. *See id.*

88. George T. Conway III, *America Owes Thanks to Trump's Lawyers—Even William Barr*, WASH. POST (June 28, 2021, 2:46 PM), https://www.washingtonpost.com/opinions/2021/06/28/george-conway-trump-barr-lawyers [https://perma.cc/7PQL-BYB8].

89. *See* W. Bradley Wendel, *Legal Ethics Is About the Law, Not Morality or Justice: A Reply to Critics*, 90 TEX. L. REV. 727, 740 (2012).

90. This has not stopped many legal philosophers from speculating about empirical and historical matters, most famously in the Hart-Fuller debate, in which both participants attempted to lay some of the blame for the legal abuses of the Nazi regime on either natural law or positivism. *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958). Although in my jurisprudential commitments I am a legal positivist, I

planation of the resilience of the legal profession rings true to someone who observed lawyers and judges closely during the Trump Administration. Returning to Miller's point, discussed above, the President and his Cabinet secretaries have the prerogative to determine what is in the public interest because they act subject to democratic political accountability.[91] But the legal system, acting to uphold the rule of law and in accordance with positive law, can and did keep those actors within certain bounds. The Supreme Court, for example, held that the Department of Commerce had acted arbitrarily and capriciously in deciding to add a question about citizenship to the 2020 Census.[92] The reason given by Chief Justice Roberts was not that the Commerce Secretary's decision was influenced by political considerations, but that the justification offered by the Secretary was pretextual.[93] The Court's decision located the problem not with the Secretary playing politics, but with him playing fast and loose with the truth. This demonstrates that the law and the procedures of the legal system that determine the truth of factual assertions are comparatively more stable and determinate than direct appeals to the public interest, which will always run into the problem of ethical pluralism.

CONCLUSION

This Collection of Essays invites scholars and readers to consider what lawyers should do in the face of concerted efforts to delegitimize the neutrality and

deliberately alluded to Fuller in the title of my book, *Lawyers and Fidelity to Law*, to invoke the importance of rule-of-law values in the ethics of lawyers and judges. *See* WENDEL, *supra* note 3. Fuller makes the argument explicit in his response to Hart:

> To me there is nothing shocking in saying that a dictatorship which clothes itself with a tinsel of legal form can so far depart from the morality of order, from the inner morality of law itself, that it ceases to be a legal system. When a system calling itself law is predicated upon a general disregard by judges of the terms of the laws they purport to enforce, when this system habitually cures its legal irregularities, even the grossest, by retroactive statutes, when it has only to resort to forays of terror in the streets, which no one dares challenge, in order to escape even those scant restraints imposed by the pretence of legality—when all these things have become true of a dictatorship, it is not hard for me, at least, to deny to it the name of law.

Fuller, *supra*, at 660. On the connection between Fuller's idiosyncratic conception of natural law, the value of legality, and professional ethics, see David Luban's brilliant essay, DAVID LUBAN, *Natural Law as Professional Ethics: A Reading of Fuller*, *in* LEGAL ETHICS AND HUMAN DIGNITY 99 (2007).

91. *See* Miller, *supra* note 78.

92. Dep't of Com. v. New York, 139 S. Ct. 2551, 2575-76 (2019).

93. *Id.* at 2575.

objectivity of public institutions. Mainstream media companies have been assailed for purveying "fake news,"[94] climate scientists and the public-health establishment have been accused of bias,[95] and when the Attorney General concluded that there was no evidence of widespread election fraud, the former President's response was, "You must hate Trump. You must hate Trump."[96] In this atmosphere, appeals to the concept of the public interest are bound to be brushed aside as merely one side in an acrimonious, inconclusive political battle. The traditional conception of lawyer as wise counselor, attuned not only to the law and the value of legality, but also to the interests of the political community, can be seen as a casualty of the Trump Era. I believe, however, that the wise-counselor concept has always rested on a less-than-secure theoretical foundation, lacking the necessary connection to the public institutions that facilitate compromise, cooperation, and settlement of normative conflict in circumstances of normative pluralism. By contrast, a *modus vivendi* that arises from a "recurrent renegotiation of interests and values"[97] is actually a significant achievement in light of political polarization. Rawls worried that reliance on provisional settlements of social conflict would not yield a society that is "stab[le] for the right reasons."[98] Right or wrong, however, the legal profession and the judiciary contributed significantly to social stability over the four years of the Trump Administration and particularly in the aftermath of the 2020 presidential election. Recognizing the significance of this stabilizing effect should be one of the central theoretical pillars of legal ethics.

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94. *See, e.g.*, Margaret Sullivan, *What It Really Means When Trump Calls a Story "Fake News,"* WASH. POST (Apr. 13, 2020), https://www.washingtonpost.com/lifestyle/media/what-it-really-means-when-trump-calls-a-story-fake-news/2020/04/13/56fbe2c0-7d8c-11ea-9040-68981f488eed_story.html [https://perma.cc/E4DY-ACA5] (analyzing Trump's use of the term in response to hard-hitting reporting on his Administration's response to the coronavirus).

95. *See, e.g.*, Natasha Korecki & Sarah Owermohle, *Attacks on Fauci Grow More Intense, Personal and Conspiratorial*, POLITICO (June 4, 2021), https://www.politico.com/news/2021/06/04/fauci-attacks-personal-conspiratorial-491896 [https://perma.cc/Z8XW-M2TH] (reporting on right-wing attacks on Fauci for being anti-Trump).

96. *See* Karl, *supra* note 71.

97. MCCABE, *supra* note 63, at 148 (quoting JOHN GRAY, TWO FACES OF LIBERALISM 108 (2000)).

98. John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 781 (1997).